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 12 UNITED NATIONAL INSURANCE COMPANY

13 **UNITED STATES DISTRICT COURT**

14 **NORTHERN DISTRICT OF CALIFORNIA**

15 **SAN FRANCISCO/OAKLAND DIVISION**

16 FIREMAN'S FUND INSURANCE COMPANY,) Case No. CV 07-04943 MHP
17 Plaintiffs,) JOINT CASE MANAGEMENT STATEMENT
18 vs.) [FRCP 26(f)]
19 UNITED NATIONAL INSURANCE COMPANY, and DOES 1 - 10)
21 Defendants.) Complaint Filed: August 21, 2007
22) Counterclaim Filed: October 1, 2007
23 UNITED NATIONAL INSURANCE COMPANY,)
25 Counterclaimant,)
26 vs.)
27 FIREMAN'S FUND INSURANCE COMPANY and ROES 1 - 10,)
28 Counter-Defendants.)

1
 2 Plaintiff and counter-defendant Fireman's Fund Insurance Company ("FFIC"), defendant and
 3 counter-claimant United National Insurance Company ("United National"), and counter-defendant
 4 Interstate Fire & Casualty Company ("Interstate") jointly submit this Case Management Statement
 5 and Proposed Order and respectfully request the Court to adopt it as its Case Management Order in
 6 this case.

7 **1. Jurisdiction and Service**

8 FFIC filed its complaint in this action in Marin County Superior Court, from which United
 9 National removed the action to this Court. United National filed an answer and counter-claim
 10 adding Interstate as a counter-defendant. Interstate and FFIC have answered United National's
 11 counter-claim. All parties have been served or waived service by general appearance. The parties
 12 have discussed a request by FFIC and Interstate to amend the pleadings to reflect a dispute only
 13 between Interstate and United National.

14 FFIC's complaint is a civil action of which this Court has original jurisdiction under 28
 15 U.S.C. § 1332(a), and is one which may be removed to this Court by defendant United National
 16 pursuant to the provisions of 28 U.S.C. § 1441(b) in that it is a civil action between citizens of
 17 different states and the matter in controversy exceeds the sum of \$75,000, exclusive of interest and
 18 costs. Jurisdiction over United National's counterclaim is conferred by 28 U.S.C. § 1337(a).

19 **2. Facts**

20 The parties submit the following separate statements and joint statement of facts:

21 **(a.) Separate Statements of Facts**

22 (1). Interstate and FFIC's Separate Statement Facts: Interstate issued a policy of
 23 professional liability insurance to Cirrus Medical Staffing LLC for the policy period January 27,
 24 2005, through January 27, 2006. United National issued a policy of professional liability policy to
 25 Cirrus for the policy period January 27, 2006 through January 27, 2007. Interstate and FFIC contend
 26 that the United National policy by its terms and/or as a result of policy ambiguity provides coverage
 27 to Cirrus for the *Tracy* action.

(2) United National's Separate Statement of Facts: The Interstate and United National policies were both issued on a claims-made-and-reported basis, under which coverage is extended only for claims first made and reported during that insurer's policy period, as set forth more fully in the policies.

(b.) Joint Statement of Facts

The parties have met and conferred and were able to reach agreement as to the following facts, although, because neither party has had an opportunity to conduct discovery, these facts do not constitute admissions and both parties reserve the right to present evidence of facts that are different from the below, should such contradictory facts be disclosed by discovery:

Cirrus was sued in an underlying medical-malpractice litigation styled *Tracy v. Cirrus Medical Staffing et al.*, State of New Mexico, Second Judicial District Court, County of Bernalillo action no.CV2005 07009. The underlying action was filed on September 14, 2005, and Cirrus was added as a defendant by way of a first amended complaint that was filed on or about March 21, 2006.

Cirrus tendered the *Tracy* action to Interstate and to United National, and Interstate agreed to defend and indemnify Cirrus under reservations of rights pending its investigation. United National advised Cirrus in October 2006 that its policy would respond only as excess coverage. United National subsequently determined that its policy did not provide potential or actual coverage for the *Tracy* action and sent a letter to Cirrus advising of this determination in February 2007. Thereafter, a settlement of the *Tracy* action was reached, with United National contributing \$100,000 and Interstate contributing \$499,000.

3. Legal Issues

A. Plaintiff's Contentions

FFIC and Interstate believe that United National agreed to jointly defend Cirrus and wrongfully withdrew from that defense, and wrongfully refused to fully fund the settlement of the Insured's liability. United National's October 2006 letter to Cirrus cited the "prior claim" exclusion in its policy. FFIC and Interstate believe that United National has mis-read its exclusion, that its exclusion is ambiguous, and that the Insured's 2006 communication does not trigger the exclusion.

1 Accordingly, United National is obligated to reimburse FFIC and Interstate for defense costs
 2 incurred and indemnity payments made, as well as pay interest on those amounts. Since United
 3 National's policy was the only policy applicable to the *Tracy* action at the time the claim was made,
 4 it should reimburse 100% of all defense and indemnity expenses incurred by FFIC and/or Interstate.
 5 FFIC and Interstate further contend that any misrepresentation claim that United National may have
 6 against Cirrus does not impact its contractual obligation to have defended the *Tracy* action until a
 7 factual determination of that claim could be made, and does not bar its equitable obligation to
 8 reimburse FFIC and/or Interstate.

9 **B. Defendant's Contentions**

10 The insuring language in Interstate's and United National's policies state that the policies
 11 apply only to claims first made and reported during that insurer's policy period. Under California
 12 law, claims-made-and-reported requirements are strictly enforced, and a claim cannot be
 13 simultaneously covered under two seriatim claims-made-and-reported policies. United National
 14 believes that Cirrus first gave notice to Interstate of the *Tracy* action and the claims in the *Tracy*
 15 action during Interstate's policy period. Interstate's policy is the only policy applicable to the *Tracy*
 16 action, therefore, and Interstate should reimburse 100% of all indemnity expenses incurred by
 17 United National.

18 Additionally, the United National policy does not apply where an insured knew of or could
 19 have reasonably foreseen a lawsuit, or a wrongful act leading to a lawsuit, before signing the
 20 application. United National contends that this condition was not met in the case of the *Tracy*
 21 action, as a matter of law, and that other provisions of the United National policy preclude a duty to
 22 either defend or indemnify Cirrus. United National did not agree to defend Cirrus in the *Tracy*
 23 action, and United National strictly reserved its rights "to reevaluate coverage on any alternative
 24 and/or additional basis"

25 **4. Motions**

26 There are no pending motions. FFIC, Interstate, and United National anticipate filing
 27 motion(s) for summary judgment and/or partial summary judgment. The parties will work to present
 28 such motions upon an agreed statement of facts, if feasible.

1 5. Amendment of Pleadings

2 Pleadings may be amended no later than 120 days prior to the trial date.

3 6. Evidence Preservation

4 The parties agree to interdict any document destruction programs that may affect evidence
5 relevant to this matter. These efforts will include the preservation of electronic materials related to
6 the claims and underwriting files at issues.

7 7. Disclosures

8 The parties will timely comply with the Court's February 25, 2008, deadline for making
9 initial disclosures.

10 8. Discovery

11 The parties have not conducted any discovery to date. The initial disclosures may
12 completely address the need for written discovery. However, some written discovery is possible, as
13 is discovery of third parties such as the Insured, and parties in possession of records of the defense
14 provided, and the defense and indemnity expenses incurred in the underlying action. FFIC and
15 Interstate also anticipate the need for one or more depositions of United National's person(s) most
16 knowledgeable regarding claims handling and underwriting issues depending on the defenses United
17 National asserts. United National's Counter-claim cites certain provisions of the New Mexico
18 Statutes but does not articulate United National's position regarding these statutes. FFIC and
19 Interstate must, therefore, reserve the right to conduct discovery on this issue.

20 United National may need to seek production of Interstate or FFIC's claim file(s) concerning
21 the *Tracy* action. United National may need to depose person(s) most knowledgeable from Interstate
22 or FFIC regarding the handling of the *Tracy* claim and communications between Cirrus or its
23 representatives and Interstate or FFIC. United National may need to depose party-related witnesses,
24 third-party percipient witnesses, or person(s) most knowledgeable concerning the underlying *Tracy*
25 action, the settlement of the *Tracy* action, notice to Interstate Fire & Casualty Company of the *Tracy*
26 action, any proceedings related to the *Tracy* action, or the facts and circumstances involved in or
27 giving rise to the *Tracy* action or any related proceeding..

28 The parties reserve their rights to object to discovery.

1 The parties agree to a discovery cut-off date of **December 5, 2008**

2 **Class Actions**

3 Not applicable

4 **Related Cases**

5 None.

6 **Relief**

7 **FFIC & Interstate's Statement of Relief Sought:**

8 FFIC and Interstate seek a money judgment for all indemnity expenses paid, all defense costs
 9 incurred on behalf of Cirrus in the *Tracy* action, as well as its attorney's fees and costs of this
 10 litigation. As set forth in the Complaint and Counter-claim, FFIC and Interstate also request that the
 11 Court issue an Order and Judgment declaring that United National is obligated to reimburse FFIC
 12 and Interstate for expenses incurred in defending and indemnifying the underlying action; that FFIC
 13 and Interstate are entitled to equitable remedies; and that FFIC and Interstate are entitled to interest
 14 on the reimbursement and attorneys fees and costs incurred in this litigation.

15 **United National's Statement of Relief Sought:**

16 United National seeks a money judgment requiring counter-defendants to reimburse United
 17 National \$100,000, plus prejudgment interest under Cal. Civ. Code §§3287(a) and 3289(b), for the
 18 money it paid toward settlement of the *Tracy* action. United National also requests that the Court
 19 enter binding declarations of the parties' respective rights and duties in accordance with United
 20 National's contentions as set forth in paragraphs 17 and 19 of its counter-claim.

21 **Settlement and ADR**

22 The parties have submitted their Joint Stipulation Selecting ADR Process. The parties agree
 23 that this matter may benefit from private mediation following resolution of legal issues by the Court.

24 **Consent to Magistrate For All Purposes**

25 This matter has been transferred to the Honorable Marilyn Hall Patel following initial
 26 assignment to Chief Magistrate Judge James Larson.

27 **Other References**

This case is not suitable for binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

15. Narrowing of Issues

FFIC, Interstate, and United National anticipate that it will be possible to narrow one or more of the issues after discovery through motions for summary judgment and/or summary adjudication of issues. Additionally, the parties will endeavor to develop an agreed statement of facts for the purpose of such motions, and, if possible, to file them as cross-motions.

16. Expedited Schedule

FFIC/Interstate and United National believe that this is a matter in which contract interpretation issues should be addressed first. If resolution of those issues does not resolve the matter, the parties should address factual disputes with streamlined procedures.

17. Scheduling

Deadline to Designate Expert Witnesses: October 20, 2008

Discovery Cut-Off: December 5, 2008

Deadline for Hearings on Dispositive Motions: January 22, 2009

Pre-trial Conference: February 5, 2009

Trial: February 23, 2009

18. Trial

The parties believe that a trial length estimate is premature. At this time, however, the parties to this Report state that:

- a. Plaintiff requests a Court Trial and anticipates it will take 3 days.
 - b. Defendant requests a Jury Trial and anticipates it will take 3-5 days.

19. Disclosure of Non-party Interested Entities or Persons

United National has filed its Certification of Interested Entities or Persons. FFIC and Interstate have not filed a Certification of Interested Entities or Persons.

Respectfully submitted,

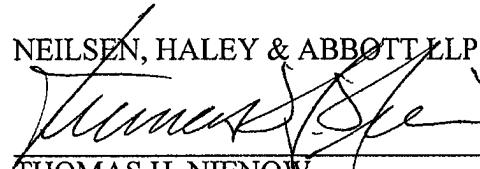
1 DATED: *February 25, 2008*
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7 DATED: *2/25/08*
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NEILSEN, HALEY & ABBOTT LLP


THOMAS H. NIENOW
Attorneys for Defendants and Counterclaimant
UNITED NATIONAL INSURANCE COMPANY

SO ORDERED.

Dated: _____

THE HONORABLE MARILYN HALL PATEL
DISTRICT COURT JUDGE
UNITED STATES DISTRICT COURT

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